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# LOS ANGELES BAR BULLETIN



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# Los Angeles BAR BULLETIN

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SEPTEMBER, 1953

No. 12

## Junior Barrister's Page

By Chester I. Lappen



Chester I. Lappen

One of my law school professors once commented that the law review was a very peculiar phenomenon. There was nothing comparable he stated to the enthusiasm and energy of embryo lawyers: they write what purports to be a definite treatment of problems which would perplex the most experienced practitioner—and then they have the audacity to publish them! Perhaps it was a desire to harness some of the enthusiasm and energy abundant among recent law school graduates which fostered the organization of the Junior Barristers just twenty-five years ago. Since that time the

Junior Barristers have prospered and now have a membership of almost 500, and provide active members for each of many committees of the Association.

Annually the Junior Barristers attempt to rekindle themselves as legal lights by writing and editing the September Issue of the BULLETIN. This year the task was ably performed by Editor Dick Wolford and His Board of Associate Editors. They were aided by those members of the Junior Barristers who submitted articles to the Fifth Annual Essay Contest conducted in conjunction with this issue. The judges (Chief District Judge Leon R. Yankwich, Professor James R. Chadbourn and W. I. Gilbert, Jr.) selected as the prize winning essay "The Legal Requirements for the Production of Documents in California" by Darrell McCrory. This article is published in this issue. Honorable Mention was awarded to Harned P. Hoose for his article entitled "That the Accused Shall be Defended" and to Arthur N. Greenberg for his article "Privilege Against Self-Incrimination." The former article is likewise published in this issue and the latter article will be published in a forthcoming issue of the BAR BULLETIN.

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The Sixth Institute on Federal Taxation of the University of Southern California Law School will be held October 21 to and including October 23, 1953. We in Southern California have been exceedingly fortunate in having the opportunity to attend this Federal Tax Institute. I say advisedly that it is viewed by all tax experts throughout the nation as one of the most outstanding in the nation. This year new features are to be added—features of practical benefit to all.

As we all realize, due to the tremendous strides made in accelerating transportation, the whole character of our practice has changed. It is also changed because of the ever increasing greediness of the Federal Government to assume control over the everyday life of the average citizen. Hence no matter what our practice, we must be familiar with the fundamental principles of Federal taxation and to have the opportunity to follow the travel of the decisions, the regulations and the planning of future amendments is not only our privilege but, if we are to be faithful to our clients, our duty.

A quick and cursory examination of the program will I am sure convince you of the urgency and necessity of availing yourself, as a lawyer, of the opportunity of attending.

I congratulate the Planning Committee who have gotten so splendid a program together.

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## Scanning Recent Legislation\*

This is another article in a series appearing in past years in the Junior Barrister's issue for the purpose of informing the Bar of recent statutory change. The Legislature has enacted a record 1895 Chapter Laws—some 193 bills having been either vetoed or left unsigned by the Governor. Most of these laws become effective September 9, 1953.

The amendments and code additions here reviewed were selected in the hope that they would be of general interest to the practitioner. No attempt has been made to digest all of the important changes. Many were chosen because of their effect on everyday problems confronting the Los Angeles lawyer, although the changes themselves were comparatively insignificant.

This article confines itself to selections taken from Chapter Laws 1 to 1,100, the remainder to be covered in a later issue. At that time additional amendments or additions to some of the codes referred to herein will be discussed.

\*This article was organized and edited by a committee composed of Wendell B. Will, Roger Williams and William L. Scott, and is due largely to the efforts of the following members of the Bar: Charles W. Barnes; R. Bradbury Clark; Robert W. Driscoll; Grover R. Heyler; Robert H. Ingram; Roy E. Potts; Warren Sikora; Melvin H. Swift, Jr.

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## CIVIL CODE

### Attorneys' Fees for Divorce and Separate Maintenance Actions

Section 137.3 of the Civil Code has been amended in several particulars, the most significant being a provision that attorney's fees and costs may be awarded for legal services rendered or costs of action incurred prior as well as subsequent to any application or order of the Court. This would include services rendered or costs incurred prior to the filing of a complaint. It is further provided that the Court may, in its discretion, before the entry of judgment, augment or modify the original award as may be necessary for the prosecution or defense of the action or any proceeding relating thereto (Ch. 620).

### Expiration or Abandonment of Mineral Leases

By the addition of Section 794 to the Civil Code, a mineral lessor is now entitled to the execution of a quit claim deed or other appropriate instrument within thirty days after demand

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on notice of surrender or termination. Penalties are provided for the lessee's failure to comply (Ch. 945).

### **Homesteads**

Section 1260 of the Civil Code has been amended to permit the head of a family to homestead property not exceeding in cash value \$12,500 (formerly \$7,500), and to allow other persons the right to select a homestead not exceeding \$5,000 in actual cash value (formerly \$3,000) (Ch. 943).

Section 1263 of the Civil Code, relating to the contents of a declaration of homestead by the head of a family, has been also amended to require that the declaration contain a statement as to the improvement or improvements which have been affixed to the property in addition to a statement of the character of the property homesteaded (Ch. 330).

### **Lessor's Covenants Affecting Contiguous Real Property**

Sections 1469 and 1470 have been added to the Civil Code reciting the circumstances under which a lessor's covenants affecting contiguous real property owned by the lessor, are binding upon his successors (Ch. 652).

### **Contract Rescission**

Section 3406 of the Civil Code, relating to the rescission of contracts by adjudication has been amended so that now all contracts, written or oral, fall within its terms (Ch. 588).

### **Stopping Payment of Bank Checks**

Section 3265(g) of the Civil Code has been repealed. This section provided for the liability of a bank which paid a check that in writing had been ordered stopped. Sections 990-995 of the Financial Code, however, are apparently still in force and impose a lesser degree of liability on a bank under similar circumstances (Ch. 601).

## **CODE OF CIVIL PROCEDURE**

### **Summary Judgments**

The summary judgment procedure has been extended to all types of proceedings by the amendment of Section 437(c) of the Code of Civil Procedure. Formerly this procedure could be used only in certain specified types of actions (Ch. 908).

### **Formal Exception to Court Orders**

Section 647 of the Code of Civil Procedure has been amended

to eliminate the requirement that formal exception be taken to all orders, decisions, actions and rulings of a Court other than those enumerated in the section, provided that the party's position is made known by objections or otherwise at the time the action is sought or taken, or within a reasonable time thereafter (Ch. 715).

#### **Destruction of Original Records**

The authorization in Section 1953(i) of the Code of Civil Procedure (pertaining principally to admissibility of reproduced records) to destroy the original records, when an accurate reproduction has been made in the regular course of business, has been withdrawn (Ch. 294).

#### **Statute of Limitation Waivers**

Section 360.5 of the Code of Civil Procedure has been amended by deleting the language referring to "acknowledgements" and "promises" and adding a general reference to "waivers." It is further provided (with exceptions) that no waiver executed after the statute has run will be effective for more than four years from the date of its execution (Ch. 655).

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### **Personal Surety Bonds**

By amendment to Section 1057 of the Code of Civil Procedure, it is now required that the clerk enter in the register of actions the date and amount of a bond executed by a personal surety, together with the surety's name. In the event the original bond is lost, the entry in the register of actions constitutes prima facie evidence of the due execution of the bond (Ch. 267).

### **Motions**

By the addition of Section 1005.5 to the Code of Civil Procedure, a motion is now deemed to have been made upon due service and filing of the notice of motion, provided that this does not operate to deprive a party of a hearing on the motion to which he would otherwise be entitled. Motions for new trials are not included within the terms of this section (Ch. 909).

### **Judgment Costs**

Section 1032 of the Code of Civil Procedure has been amended to eliminate the prohibition against recovery of costs where a judgment is recovered in superior court which could have been rendered by a municipal or justice court (Ch. 910).

### **Exemption From Execution or Attachment**

An amendment to Section 690.26 of the Code of Civil Procedure, relating to exemption from execution or attachment, completely recasts this provision and imposes several additional requirements. The original claim of exemption must now be in the form of an affidavit and must contain the address of the debtor within the state so that he may be served by mail with the counter-affidavit and any notice of the motion for hearing on the claim. The levying officer is now required to give notice and a copy of the debtor's affidavit to the creditor, together with a statement that he will release the attached property if no counter-affidavit is filed within five days. The motion for a hearing on the claim must be filed within five days after the filing of the counter-affidavit, and the hearing must be held within fifteen days from the date of the motion unless otherwise ordered by the Court. A new provision permits the admission into evidence of the affidavit and counter-affidavit and allows the court, if it is satisfied that

sufficient facts appear from the affidavits, to make its determination solely on the basis of an examination of the affidavits. Other requirements too lengthy to recite have also been enacted (Ch. 840).

#### **Interpleader**

A new section (Code of Civil Procedure, Section 386.5) has been added to supplement the existing interpleader statutes. It provides that where the only relief sought against one of the defendants in an action is the payment of a stated amount of money which is alleged to be wrongfully withheld, such defendant may, upon affidavit that he is a mere stakeholder with no interest in the amount or any portion thereof, and that conflicting demands have been made upon him for the amount by parties to the action, and upon notice to such parties, apply to the court for an order discharging him from liability and dismissing him from the action upon his depositing with the clerk the amount in dispute (Ch. 328).

#### **Perpetuation of Testimony**

Sections 2084, 2085 and 2086 of the Code of Civil Procedure relating to perpetuation of testimony proceedings, has been amended so as to make more explicit the procedures there outlined. Some of their subject matter has been inserted into a new section—2084.1. By the addition of Section 2084.2, it is provided that the judge issuing a perpetuation order may impose such reasonable conditions as in his discretion will protect the parties from abuse of process. Section 2084.2 also provides requirements for obtaining a subpoena duces tecum in conjunction with perpetuation of testimony proceedings, apparently conforming to those requirements previously set forth by the Supreme Court<sup>1</sup> (Ch. 1077).

### **CORPORATIONS**

#### **Fixing the Number of Directors**

Section 301(d) of the Corporations Code has been changed materially by the addition of a clause permitting a provision in the articles of incorporation or by-laws for a stated minimum (not less than five) and a maximum (not to exceed the stated minimum by more than three) number of corporate directors. Where this provision is utilized, the exact number

<sup>1</sup>See e.g., *Strauss v. Superior Court*, 36 Cal.(2d) 396, 224 P. (2d) 726 (1950).

of directors may be fixed by directors or shareholders and the minimum and maximum may be changed by a by-law adopted by shareholders. Sections 500, 501 and 3600 were also amended to reflect this change (Ch. 967).

#### **Director's Right to Inspect Corporate Documents**

To Section 3004 of the Corporations Code (relating to a director's right to inspect books, documents and properties of his corporation) has been added the sentence: "Such inspection by a director may be made in person or by agent or attorney, and the right of inspection includes the right to make extracts." This amendment appears to be a legislative rejection of the decision in *Dandini v. Superior Court*<sup>1</sup> (Ch. 899).

#### **Articles of Incorporation**

Section 301(b) of the Corporations Code has been amended to provide that articles of incorporation as filed must set forth the purposes for which the corporation is formed, including a statement "in a separate paragraph" identifying the "specific business" in which the corporation proposes "primarily and initially to engage." (Ch. 967.) Sections 3670 and 3672, relating to certificates of amendment of articles, have also been amended (Ch. 1126).

#### **Merger and Consolidation**

Sections 4100, 4102, 4107, 4110, 4111, 4113, 4114, 4116, 4119, 4120 and 4121 of the Corporations Code, relating to the procedure followed in and the effect of merger and consolidation, have been amended to give effect to the redefinition of a "constituent" corporation as one "merged or consolidated with one or more other corporations" and to make more precise the use of this term and of the terms "surviving corporation" and "consolidated corporation." Section 4119 of this group, relating to the filing of documents in cases of merger, has been further amended by the addition of a requirement that constituent foreign corporations qualified to do intrastate business in California shall file in California a copy of the merger document filed in the state of incorporation, thereby filling a gap in the former filing requirements of this section (Ch. 1126).

#### **Limited Partnerships**

Sections 15,502 and 15,525 of the Corporations Code, relating to the execution of certificates of limited partnership and amend-

(continued on page 445)

<sup>1</sup>38 Cal. App. (2d) 32, 100 P. (2d) 535 (1940).

## The Legal Requirements for the Production of Documents in California

By Darrell P. McCrory\*



Darrell P. McCrory

THERE are few civil cases in which one of the parties to the action would not be benefited if he were able to inspect documents and papers containing competent evidence which are in the hands of his adversary in the litigation. Yet many attorneys fail to use the tools available to them to inspect documents which they are entitled to see. On the other hand, many requests for the production of documents are acceded to by counsel who feel that they do not have the time to do the legal research necessary to oppose a motion for inspection, or to move to quash a subpoena duces tecum served upon their client, with the result that certain data not required to be given opposing counsel fall into their hands, aiding in the preparation of the opponent's case.

This article does not purport to be an exhaustive thesis on the production of documents in California, but rather a discussion of certain basic principles concerning the use of the tools available for the production of documents.

In California the rules for the production of documents are codified in the Code of Civil Procedure, Sections 1000 and 1985. These sections set forth two distinct procedures. Section 1000 of the Code of Civil Procedure provides for the inspection of documents in the hands of the opposing party. It provides:

"Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the

\*Of the Los Angeles Bar Association; Phi Alpha Delta; admitted to practice in 1949; Deputy City Attorney, Los Angeles, Criminal Division (1949-51), Civil Litigation for Department of Water & Power (1952-1953).



entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness."

Section 1985 of the Code of Civil Procedure provides for compelling a person to produce books, papers, and documents when he is examined as a witness. It provides:

"The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence.

"*Subpoena duces tecum*. All applications before trial for subpoenas duces tecum shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control."

These two methods differ in several important respects. In the first place, Section 1000, which provides for the inspection, requires a court order after a hearing. It is necessary for the moving party to file and serve a regular notice of motion in the manner prescribed by statute for the presentation of motions and the application for orders (Code of Civil Procedure, Sec. 1003 to 1007).<sup>1</sup>

The application for a court order of inspection must be accompanied by an affidavit and these documents together must contain facts setting forth (1) the designation or description of any book, paper, or document sought to be inspected; and (2) that the books, or the paper, or the document that is sought to be inspected contains evidence that is material to an issue which is involved in the action or the proceeding with relation to which the order is proposed to be made.<sup>2</sup>

Section 1985 does not require a court order prior to the issuance of a subpoena duces tecum, which is issued in the same manner as an ordinary subpoena. Although the subpoena duces tecum requires

<sup>1</sup>*People v. Nields*, 70 Cal.App. 191, 194; 232 Pac.985 (1924).

<sup>2</sup>*Union Trust Co. v. Superior Court*, 11 Cal. (2d) 449,454; 81 P. (2d) 150 (1938).

the filing of an affidavit by the applicant, the Clerk is authorized to issue it without an order of court.<sup>3</sup> Section 1985 of the Code of Civil Procedure states specifically that the affidavit must specify the exact matters or things desired to be produced, and must set forth in full detail the materiality thereof to the issues of the case.

The two methods of production also differ as to the persons to whom they apply. It will be noted that Section 1000 of the Code of Civil Procedure refers only to "either party," while Section 1985 of the Code of Civil Procedure refers to "a witness." Therefore, any person whose deposition can be taken under any of the provisions of Section 2021 of the Code of Civil Procedure, but who is not a party, may be required to produce documents at the taking of his deposition. If he is not a party to the action, he is not subject to a motion for an order of inspection.

There is a difference in the method of attack on the two modes for the production of documents. In the case of inspection, a party opposing the inspection can file affidavits and points and authorities prior to the court hearing on the motion for the order. He then has an opportunity to argue in court against the court granting the order of inspection. In the case of the subpoena duces tecum, the initial contest can come at either of two times. The party on whom the subpoena duces tecum was served can move to quash the subpoena duces tecum prior to the date designated for the production of documents,<sup>4</sup> or the party can wait until the date designated for the production of documents and then refuse to produce the documents pending a court hearing on a contempt citation.<sup>5</sup> This difference is significant to a party who desires to "bluff" his way into inspecting certain documents where he has only a questionable right. If he chooses inspection as his mode of production, he must face a court hearing and receive a ruling on his right of inspection prior to having access to the documents. If he proceeds by way of a subpoena duces tecum, the opposing counsel may not contest the subpoena duces tecum but may accede to the demands without a fight. This being the case, the moving party would have access to the documents without the chance of an adverse court ruling.

The two methods of production are similar in that the primary attack upon each method is against the sufficiency of the affidavit supporting it. The attack is usually based upon an insufficient des-

<sup>3</sup>*Southern Pac. Co. v. Superior Court*, 15 Cal. (2d) 206; 100 (P.) 2d, 302 (1940).

<sup>4</sup>*Ibid.*

<sup>5</sup>*Kuliman, Salz and Co. v. Superior Court*, 15 Cal.App. 276; 114 Pac.589 (1911).

ignation or description of the documents sought to be produced, or an insufficient setting forth of facts to show that the documents set forth are material to the issues of the case and are competent admissible evidence.

**AN AFFIDAVIT IN SUPPORT OF A REQUEST FOR THE PRODUCTION OF DOCUMENTS MUST CONTAIN A SPECIFIC DESCRIPTION OF THE BOOKS, PAPERS AND DOCUMENTS COMMANDED TO BE PRODUCED.**

Section 1985 of the Code of Civil Procedure states that all applications for a subpoena duces tecum shall be accompanied by an affidavit specifying the exact matters and things desired to be produced. As noted previously, this rule also applies to the affidavit in support of an application for an order of inspection. It has been held that the proper designation or description of the documents sought to be produced is equal or paramount to the requirement of materiality. The constitutional right of people to be protected against unlawful seizure of their private documents forecloses authority in the court to order a general or indiscriminate ransacking of one's private books, papers and documents as a means of locating desired evidence. The mere fact that a party seeking an inspection of private papers in the possession of another is unable to specify the particular thing to which he desires access does not justify a departure from the strict requirements of the Constitution.<sup>6</sup>

This requirement does not create the obstruction that might first appear. Whether the description of records is sufficient to inform their custodian of that which is desired presents a question merely of whether, under the circumstances and situation generally, considered in the light of reason and common sense, he ought to recognize and be able to distinguish or identify the particular thing that is required.<sup>7</sup> An early Federal case interpreting Section 1000 of the Code of Civil Procedure points out that the description must not only identify the documents to the adverse party, but that the description must be sufficient to enable the court to determine the propriety of allowing the inspection sought.<sup>8</sup>

In many cases a party will be unable to designate with par-

<sup>6</sup>*Funkenstein v. Superior Court*, 23 Cal.App. 663; 139 Pac.101 (1914).

<sup>7</sup>*Union Trust Co. v. Superior Court*, 11 Cal. (2d) 449; 81 P. (2d) 150 (1938).

<sup>8</sup>*San Fernando Copper Mining and Reduction Co. v. Humphrey*, 111 Fed. 772 (C.C.S.D. Calif., 1901).

ticularity those documents he desires to be produced. If the party does not know the exact name or description of the documents or records he wishes to be produced, he can describe them by their contents. For an example of this method of description, see the case of *Lockheed Aircraft Corp. v. Superior Court*, 153 P. (2d) 966, wherein an excellent affidavit is set forth. This case was appealed to the Supreme Court on other grounds than those we are concerned with here. Therefore, the points which we are concerned with appear only in the Advance California Appellate Reports and in the Pacific Reporter noted above.

An affidavit which does not specifically describe any papers or documents or their contents is defective.<sup>9</sup> Therefore a primary rule of description is to be as specific as it is possible for you to be. For example, if you desire the production of correspondence, designate the sender, the recipient, the approximate date, if known, and the specific subject matter of the correspondence.<sup>10</sup> If you want records of commercial transactions, limit the request to the specific transaction concerned. An attempt to inspect all transactions within a specified period may make your affidavit defective.<sup>11</sup>

An affidavit which merely designates records, reports and X-rays "which pertain to the examination, care and treatment" of the plaintiff, has been held to be defective.<sup>12</sup> If you do not know the names of the documents desired, do not attempt to identify them simply as documents relating to or pertaining to the subject matter of the action. Instead, phrase the description in terms of what you expect the contents of the documents to be.<sup>13</sup>

The fact that a party does not know the description of the documents, or whether in fact any documents exist, need not defeat his ultimate right to inspect prior to trial those that do exist. By the use of the deposition he can require disclosures as to the existence and description of pertinent documents. He can then describe them with sufficient particularity to require production. In order to "smoke out" the opponent's documentary evidence by the deposition method, it is usually advisable to ask the witness at any early stage in the deposition to describe in detail all correspondence between the parties, or copies of such correspondence in his possession, and all writings or documents made by the opposing party

<sup>9</sup>*McClatchy v. Superior Court*, 26 Cal. (2d) 386; 159 P. (2d) 944 (1945).

<sup>10</sup>*Ex Parte Jaynes*, 70 Cal. 638; 12 Pac. 117 (1886).

<sup>11</sup>*Palladini v. Superior Court*, 178 Cal. 369; 173 Pac. 588 (1918).

<sup>12</sup>*Nelson v. Superior Court*, 9 Cal. (2d) 729; 73 P. (2d) 232 (1937).

<sup>13</sup>*Lockheed Aircraft Corp. v. Superior Court*, 153 P. (2d) 966 (1944).

which are within his knowledge. His answers to these questions usually lead to the production of such papers. Usually, such papers are then produced by agreement between opposing counsel. If such an agreement cannot be arrived at, counsel taking the deposition can at this time prepare a subpoena duces tecum and serve it upon the deponent. The further taking of the deposition can be adjourned until the date specified in the subpoena duces tecum for the production of the documents.

**AN AFFIDAVIT IN SUPPORT OF A REQUEST FOR THE PRODUCTION OF DOCUMENTS MUST SHOW THAT THE DESIRED BOOKS, PAPERS AND DOCUMENTS CONTAIN EVIDENCE THAT IS MATERIAL TO THE ISSUES TO BE TRIED.**

While many California cases appear to treat the issues of materiality and admissibility as one subject, I would like to discuss them separately because they present separate and distinct problems. It is possible that a document would be material, but would not be admissible in evidence.

In determining the question of materiality of records sought to be inspected or produced, the trial court will not be limited to a consideration of the affidavit, but may also consider the contents of the pleadings in the case.<sup>14</sup> It is conceded that the code sections governing the production of documents are remedial in nature and should be given a liberal construction to aid in the proof of issues before the court, but it must first be shown that the documents desired are material to the issues of the case. Although it would be unjust to permit a party to triumph in a lawsuit by suppressing or withholding evidence which is material or vital to the action, the party seeking production of the documents must first show the materiality of the desired evidence and cannot obtain permission to search through his adversaries' papers and records merely in the hope and expectation that the investigation will disclose favorable information.<sup>15</sup>

To properly determine what facts should be set forth in the affidavit to establish materiality, it would be necessary to analyze the issues involved in the case. If there are several issues, each document sought to be produced should be identified with the particular issue for which it contains probative evidence. See *Lock-*

<sup>14</sup>*Union Trust Co. v. Superior Court*, 11 Cal. (2d) 449; 81 P. (2d) 152 (1938).

<sup>15</sup>*McClatchy v. Superior Court*, 26 Cal. (2d) 386; 159 P. (2d) 944 (1945).

*heed Aircraft Corporation v. Superior Court*, 153 P. (2d) 966. The burden is on the affiant to set forth the facts and reasons wherein the materiality exists. It is not sufficient to merely rely upon the legal conclusion, stated in general terms, that such papers or books are material. An affidavit which states in detail what is expected to be proved by the documents may sufficiently show their materiality even though the application does not affirmatively show the materiality of the evidence sought to be adduced.<sup>16</sup> Therefore, in order to establish materiality, the affidavit must somewhere contain averments as to the contents of the papers or documents, or as to what facts, if any, could be proved thereby.<sup>17</sup>

**AN AFFIDAVIT IN SUPPORT OF A REQUEST FOR THE PRODUCTION OF DOCUMENTS MUST SHOW THAT THE DESIRED BOOKS, PAPERS AND DOCUMENTS CONTAIN COMPETENT AND ADMISSIBLE EVIDENCE.**

A careful reading of Sections 1000 and 1985 of the Code of Civil Procedure indicates that they refer only to documents and writings which are admissible in evidence. Section 1000 states: "Any court in which an action is pending . . . may, upon notice, order either party to give the other, . . . an inspection and copy or permission to copy . . . any document . . . containing evidence relating to the merits of the action, or the defense therein." Section 1985 states: ". . . It may also require him to bring with him any books, documents, or other things under his control *which he is bound by law to produce in evidence.*"

The California courts have not attempted to lessen the statutory requirements in this regard.<sup>18</sup> An affidavit in support of a demand for the production of documents must clearly show that the documents sought contain competent and admissible evidence.<sup>19</sup>

If any of the books, papers, or documents sought to be produced are admissible in evidence upon any theory, it is the duty of the affiant to set forth the facts and reasons showing wherein the admissibility consists, and it is not sufficient for the affiant to merely rely on the legal conclusion, stated in general terms, that such books, papers or documents are admissible.<sup>20</sup>

<sup>16</sup>*Union Trust Co. v. Superior Court*, 11 Cal. (2d) 449, 455; 81 P. (2d) 152 (1938).

<sup>17</sup>*McClatchy v. Superior Court*, 26 Cal. (2d) 386; 159 P. (2d) 944 (1945).

<sup>18</sup>*People v. Nields*, 70 Cal. App. 191, 194; 232 Pac. 985 (1924).

<sup>19</sup>*McClatchy v. Superior Court*, 26 Cal. (2d) 386; 159 P. (2d) 944.

<sup>20</sup>*Shell Oil Co. v. Superior Court*, 109 Cal. App. 75; 292 Pac. 531 (1930).

Evidence which the affidavit discloses to be hearsay is not competent and therefore not subject to production.<sup>21</sup>

Since an order of inspection or a subpoena duces tecum can only be directed to competent and admissible evidence, these devices cannot serve as a "fishing expedition" in which a party seeks the production of documents and memoranda which might aid in the preparation of his case, but which are inadmissible in evidence.<sup>22</sup>

### CONCLUSION

In preparing an affidavit in support of an order of inspection or a subpoena duces tecum, an attorney should recognize that he is confronted with three distinct problems. First, he must adequately describe or designate the documents he desires to be produced. If description is a problem, a deposition, if proper, can be used to obtain the information necessary to properly describe the documents sought. Next, the court must be advised of the materiality of the documents to the issues of the case. You can help the court by stating in your affidavit the specific issue which makes the desired document material. Finally, you should set forth facts which will show that the documents desired are relevant, competent and outside of any exclusionary rule.

### SCANNING RECENT LEGISLATION

*(continued from page 437)*

ments thereof, have been amended, the requirement that such certificates or amendatory documents be signed and sworn having been replaced by a requirement of signature and acknowledgment (Ch. 540).

<sup>21</sup>*Shell Oil Co. v. Superior Court*, 109 Cal. App. 75, 292 Pac. 531 (1930).

<sup>22</sup>*Ex Parte Clarke*, 126 Cal. 235, 242; 58 Pac. 548 (1899); *Commercial Bank v. Superior Court*, 192 Cal. 395, 397; 220 Pac. 422 (1923).

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### **Service of Process: Foreign Corporations**

Section 15,700 of the Corporations Code, relating to appointment of and service upon process agents for foreign partnerships, has also been amended in a number of respects. Such an agent henceforth must be a natural person residing in this state, and his name and address must be stated in the appointive instrument. Process may be served by personal delivery upon such person, or, if he cannot be found at the address given or if no agent is designated, upon the Secretary of State. A filing fee of \$5.00 is also provided (Ch. 1127).

### **Corporate Security Act: Fees**

The method and basis of computing the value of securities in order to determine the amount of the application fees provided by Section 26,003 of the Corporations Code has been changed with respect to securities without par, securities with value in excess of par and stock warrants or rights to purchase securities (Ch. 639).

## **REVENUE AND TAXATION CODE**

### **Tax Evasion**

Section 19406 of the Revenue and Taxation Code has been added to the sections dealing with income tax violations to provide a penalty of imprisonment or fine not to exceed \$5,000, or both, where there is a willful failure to file any return or to supply information on request, with intent to evade the tax. This penalty is also made applicable to any person who willfully and with a like intent makes, renders, signs or verifies any false or fraudulent return (Ch. 544). By amendment to Section 25961, a similar penalty is provided for corporate taxes (Ch. 545).

### **Unharvested Crops and Livestock**

Section 17724.1 of the Revenue and Taxation Code has been added to bring the California law into conformity with the Federal law. It provides that unharvested crops on land held for more than one year are considered as "property used in trade or business" when the crops and land are sold or exchanged (or compulsorily or involuntarily converted) at the same time and to the same person. Section 17721 of the Revenue and Taxation Code has also been amended to permit the same treatment for livestock (Ch. 54).

### **Basis of Surviving Spouse's Property**

Section 17746.3 of the Revenue and Taxation Code has been



added to provide that the basis for gain or loss of a surviving spouse's one-half share of community property is the fair market value of said property as of the date of death of the predeceased spouse (Ch. 120). By amendment to Section 17746.5 of the Revenue and Taxation Code the same advantage has been given to interests in a joint and survivor's annuity (Ch. 118).

### **PROBATE CODE**

#### **Reduction of Excessive Bond**

By amendment to Sections 553.3 and 1483.1 of the Probate Code, an account need no longer be prepared in order to obtain the reduction of an excessive bond. Reduction may now be obtained by an executor, administrator or guardian merely by petition. Where the estate is large, however, the courts will probably continue to require an account (Ch. 675).

#### **Sale of Estate's Business Properties**

By expansion of the unit-sale statute, Section 754.5 of the Probate Code, any properties related by the manner of their use may be sold as a unit. Formerly, a unit-sale was permissible only where personality and reality were physically attached (Ch. 351).

#### **Petitions to Determine Heirship**

Section 1080 of the Probate Code has been amended to permit an executor or administrator, as well as those having claims to the estate, to file a petition to determine heirship. This change permits an executor or administrator to obtain an interpretation of a will prior to any petition by the executor or administrator for distribution and despite the fact that those with claims fail to file a petition to determine heirship (Ch. 359).

#### **Trusts Created by Non-resident Decedents Containing California Assets**

Where a non-resident decedent creates a trust composed, in part, of California assets, a group of new statutes, (Sections 1132-1136 of the Probate Code) permits the expense and legal problems resulting from double administration to be avoided, by providing for transfer of the assets to the domiciliary trustee. However, the transfer procedure may be utilized only where the assets in California are below \$7500 in value (Ch. 350).

#### **Testamentary Trust Income During Administration**

Probate Code Section 162 has been substantially amended. The

chief change is the requirement of payment of interest on testamentary trust income which is accumulated during administration of the estate (Ch. 986).

### **LABOR CODE (WORKMEN'S COMPENSATION)**

#### **Assignment of Claims and Liens to Labor Commissioner**

By amendment to Section 96 of the Labor Code, the list of assignments which may be taken by the Labor Commissioner has been enlarged to include awards for workmen's compensation benefits where the employer has failed to secure payment (Labor Code, Sections 3701, et seq.) and has not paid the award within ten days after it became final. This provision has been made an exception to Section 4900 of the Labor Code (Ch. 553).

#### **Time Limitation for Reduction of Compensation**

Limitations on the period within which compensation may be reduced for serious and willful misconduct of the employee have been added to the Labor Code in a new section, 5407.5. The twelve-month period of limitation now provided has been expressly made inapplicable where recovery is sought for serious and willful misconduct of the employer (Ch. 572).

#### **Release or Compromise Agreement**

Section 5003 of the Labor Code has been amended to provide that where the employee or other beneficiary relies on a notary public instead of two disinterested persons for authentication of a release or compromise agreement, the authentication must take the form of an acknowledgement instead of an attestation (Ch. 554).

### **PENAL CODE**

#### **Minimum Punishment for a Felony**

Section 18(b) has been added to the Penal Code, making the minimum sentence six months for all felonies punishable by imprisonment in the state prison for a maximum term of fifteen years or less (Ch. 720).

#### **Punishment for Grand Theft**

Section 489 of the Penal Code has been amended to eliminate the one-year minimum sentence for grand theft (Ch. 734).

#### **Punishment for attempts**

Section 664 of the Penal Code, which provided a twenty-year maximum sentence for the attempted crimes of murder, lewd and

lascivious conduct, robbery and first degree burglary, now also applies generally to attempts to commit crimes for which there is either no maximum sentence set by law, or the maximum sentence is life imprisonment or death (Ch. 713).

#### **Prisoners Who Take Hostages Are Guilty of a Felony**

In an effort to curb the recent increase in kidnappings of prison guards during escape attempts, it has now been made a felony, under new Penal Code Section 4503, for a prisoner to hold any person as hostage within any prison or facility under the jurisdiction of the Director of Corrections, or for a prisoner to hold such person by force or threat of force against his will in defiance of official orders (Ch. 723).

#### **NEW UNEMPLOYMENT INSURANCE CODE**

The legislature has enacted the Unemployment Insurance Code which is a codification of the laws relating to the administration of unemployment insurance. The new code consolidates and revises the law on unemployment and disability compensation (Ch. 308).

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### CODIFICATIONS INTO EXISTING CODES

The following general laws have now been codified into existing codes:

The Principal and Income Law, formerly found as Act 8696 of Deering's General Laws, has been codified in Civil Code Sections 730-730.15 (Ch. 37).

The Warehouse Receipts Act, formerly found as Act 9059 of Deering's General Laws, has been added to the Civil Code in Sections 1858.01-1858.85 (Ch. 1903).

The Foreign Warehouse Receipt Law, formerly found as Act 9058 of Deering's General Laws, is codified in Civil Code Sections 1858.90-1858.93 (Ch. 37).

Laws relating to the deposit of money held by bonded fiduciaries and formerly found as Act 8317 of Deering's General Laws, have been inserted in the Civil Code as Section 2811 (Ch. 37).

The Spite Fence Law, formerly found as Act 2532 of Deering's General Laws, has been codified in Section 841.4 of the Civil Code (Ch. 37).

Sections 1700 through 1706 of the Code of Civil Procedure, formerly found as Act 2560 of Deering's General Laws, now constitute the Fiduciaries Wartime Substitution Law, providing for the appointment of substitutes for fiduciaries who are engaged in war service or certain other types of activity (Ch. 52).

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## That the Accused Shall be Defended

By Harned Pettus Hoose\*



Harned Pettus Hoose

WITHIN the past few days, the world had learned that a man called John Little stood accused and indicted of a horrible crime. Throughout the country, his name was mentioned only with loathing, as if it were a vile word. In Federal City, where the crime had been committed and where Little's trial would take place, his case was the main topic of conversation. The local papers ran editorials to the effect that the crime was one against

the nation as well as against the individual victim.

Little had been a foreigner. He had no funds. At least he claimed he had no funds. He was hated because of the heinous nature of the crime of which he was accused. No lawyer in town wanted to have anything to do with the case. The older and more experienced ones were too involved in other matters. A few outspoken attorneys let it be known here and there that they would not consider defending anyone accused of that crime against the country.

The presiding judge was forced to appoint a lawyer to defend Little. Richard Kennedy was assigned to the task. Richard Kennedy, attorney at law, had been qualified to use that title only a few months earlier. His shingle still was all but wet with fresh paint. His case load was negligible and his clients were few, because he was just getting started in practice.

Kennedy was shocked at the assignment. His stomach turned at the thought of the crime, and he fought to control the disgust and revulsion within him as he conferred with Little in the prison cell. Little was unshaven, uncouth and illiterate. He was no man to inspire great sacrifice by a lawyer.

After the interview with the accused, Kennedy went to his modest office across the street from the courthouse. As he sat at his desk, fear gripped him and his hands were wet. The men mopping the hall had stepped away from him as he passed, and their faces

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showed they had heard. "There goes John Little's lawyer," they whispered.

Kennedy knew his unpaid, unsolicited role as defense counsel would link him with the accused, in the public mind. With all his heart, he wanted to avoid that.

The telephone rang. Kennedy's part-time secretary had left, so he answered the telephone. It was a client, calling to cancel an appointment for later that afternoon. "Sorry, but I have a conflict in my schedule," the client explained.

Richard Kennedy locked his door carefully, and went down the hall to the offices of an older lawyer. Richard needed advice. The older lawyer urged him to get out of the case. Better plead hardship—illness—conflicting cases," the man advised.

When Kennedy left the office building, the sun had set and darkness was beginning to cloak the courthouse across the street. Aimlessly, he crossed the street and climbed the courthouse steps. The great carved wooden doors of the courtroom were unlocked. The room within was almost dark. Richard walked down the carpeted aisle between the spectators' benches, and sat down at counsel's table. The darkness in the room seeped into his mind and heart. He was afraid. How could he defend this man? How could he stand the inevitable personal accusations? Then, as if he were a boy once more and in the loneliness of the empty courtroom, Richard hunched over with his arms and face on the table. He wept.

A while later, the sound of some movement in the rear of the courtroom aroused Kennedy. Richard was startled by the noise in the darkened room, and was embarrassed at the thought of being found there at night. Sitting up abruptly, he swung around in his chair and stared at the last bench. He could hardly see the figures of the men seated there. "Who is there?," he called.

One of the figures quietly stood up and spoke. "Do not fear, boy. We are friends. We come here often and sit through many trials." The figure moved forward a pace or two until the reflected rays of an early streetlight outlined his features. He was dressed in a flowing robe and wore sandals. His kindly face was framed with white hair and he seemed to be at least seventy in age.

He spoke again. "Richard Kennedy, attorney at law, I am co-counsel in all cases such as yours. People call me Socrates. More than two thousand years ago, I was tried by the people of Athens

for two terrible crimes. I was accused of denying the gods and of teaching my associates to despise state institutions. My prosecutors were Anytus, Meletus and Lycon. My judges were five hundred and one men of Athens, sitting in judgment in one of the ten assemblies my people selected by lot to judge cases like that of John Little."

Kennedy sat transfixed, listening. The figure near the last bench continued. "I was innocent, but that is of no moment now. No one spoke for me during my trial. I alone defended myself, and therefore my defense was not adequate. The verdict was guilty. I suffered death by hemlock, undefended by any man. You and your brothers must not permit anyone to die undefended."

The robed figure returned to the rear bench and sat down. The figure beside him arose, and spoke. "I am he that is called Paul the Apostle, once of Tarsus. Like you, Richard Kennedy, I was trained in law. I was privileged to know intimately the greatest defendant of them all. When that defendant stood accused before the judge Pontius Pilate, there was no counsel to defend Him. Pilate washed his hands of the matter. You, Richard Kennedy, and the men of your calling, are charged with the sacred task of insuring always that the accused shall be defended."

As the second figure sat down, Richard Kennedy was trembling. He gripped the arms of his chair tightly, and spoke uncertainly. "Yes, Paul, but the defendant you speak of was innocent of any crime. All men would be proud to defend Him. What of this John Little? He is accused of something terrible. He may be found guilty. If I defend him, I may be thought guilty with him."

Abruptly, a third figure arose at the rear bench. He was young and his gestures were vigorous. "Son, I am Patrick Henry. I refused to sign the constitution and in 1778 I fought its ratification in Virginia, because it lacked a Bill of Rights. Partially because of my insistence, James Madison subsequently presented to Congress the first ten amendments, including the Sixth Amendment. Aren't you forgetting, attorney Richard Kennedy, the wording of that amendment? It declares that 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.'"

Patrick Henry continued, "Son, remember your lawyers' oath: Never to reject the cause of the defenseless or the oppressed. And remember the Fourth and Fifth Canons of professional ethics set



forth by the American Bar Association. Under them, your best efforts on behalf of an indigent prisoner are required, to the end 'that no person may be deprived of life or liberty, but by due process of law.'"

The young figure of Patrick Henry advanced a few steps down the aisle. Standing in the reflected streetlight, he continued. "Consider the proud heritage that is yours, young man. Do you remember the great French advocate, Malesherbes? During the French revolution, he showed splendid professional courage for an unpopular client and a fatal cause. Think, you, of his defense of Louis XVI before the National Convention during the Reign of Terror! Remember his noble statement:

'I was twice called to the council of the King when all the world coveted the honor and I owe him the same service now when it has become dangerous.'

"Malesherbes did not fear to defend his client in the face of sure death, and his lawyer's fee was to perish with the accused on the guillotine."

Patrick Henry gestured toward the seated figures on the last bench. "See, there sits counsel Malesherbes. And beside him sits Lord Erskine. Do you remember Lord Erskine, Richard Kennedy? He sacrificed social popularity and political prestige by defending the then despised Tom Paine, who was indicted in 1792 for publishing the *Rights of Man*." The figure of the young orator turned again toward Erskine. "Will you speak to this young man in the words you used in that defense?"

Lord Erskine rose slowly, and took Henry's place in the faint light at the end of the bench. Adjusting his coat with care, he addressed the young lawyer in precise English.

"In every place where business or pleasure collects the public together, day after day, my name and character have been the topics of injurious reflection. And for what? Only for not having shrunk from the discharge of a duty which no personal advantage recommended, and which a thousand difficulties repelled.

"Little, indeed, did they know me, who thought that such calumnies would influence my conduct: I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence.

"If the advocate refuses to defend, from what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment. . . ."

Lord Erskine paused for a moment. Then he spoke again. "But the hour grows late, and we would have you meet many others of us, young Dick." The imposing figure of the English Lord turned, and he gestured gracefully at successive figures sitting on the rear bench. As he spoke of each man, the figure rose and bowed gravely to Kennedy.

"Yonder sits William Henry Seward, who defended the unpopular negro Freeman in 1846. A horrible murder had been committed. The crime drew a storm of passion and prejudice. It was clear that any lawyer daring to defend Freeman would be enveloped in the storm and corroded by the prejudice. Yet when the judge asked in the crowded courtroom, 'Will any one defend this man?', Seward arose and took his place as defense counsel. His tombstone is inscribed, 'He was faithful.'"

Lord Erskine paused long enough to permit Seward to rise and nod at Kennedy. Then the English advocate continued.

"Next, sits Brougham. In the teeth of royal anger and social persecution, he defended the unfortunate Queen Caroline. Beside him are John Adams and Josiah Quincy. Do you remember, young Dick, their successful but unpopular defense of the British soldiers accused of murder during the Boston Massacre? And yet they went forward after that to assist in forming and leading your nation."

An impatient figure in white shirtsleeves suddenly stood up at the far end of the rear bench. His blue suspenders showed clearly in the faint light of the courtroom. His hair was dishevelled, and he talked rapidly.

"Richard Kennedy, I am Clarence Darrow. I took the part of defendant John Thomas Scopes in the anti-evolution criminal trial in Dayton, Tennessee, in 1925. The people hated my client and me in that courtroom, and we lost. But all of us here tonight have won and held something for mankind far more precious than mere victory in trial. We have won a tradition of fearless representation of those accused of crime, whether the accusation seem just or unjust; we have implemented and safeguarded the principle that a man is presumed innocent until proven guilty; and we have established a rule of professional conduct for lawyers that you must honor and preserve at all cost to yourself."

As Darrow concluded, Socrates again stood. Softly, he said, "The night has grown late, counsel. We must go now."

For the first time, Richard Kennedy was able to rise. His voice was calm, now, as he answered. "Thank you, gentlemen. Will you return?"

Paul of Tarsus answered Dick. "We will return many times. We and others like us are with you in all the courts of this land and of other freedom loving peoples. We also stand in the shadows in the so-called courts of tyrants. We were with Cardinal Mindszenty and Richard Vogeler in Europe. In a few weeks, we shall be co-counsel with you in the case of John Little. Unlike the two in Europe, the accused John Little is fortunate in having his case heard by a just and impartial tribunal. Your duty as defense counsel is to use utmost energy and every legal means to protect Little. Only thus can justice be achieved. Go thou in peace."

A moment later, Richard Kennedy, attorney at law, was alone again in the darkened courtroom.

\* \* \* \* \*

On another day a few weeks later, every seat in the Federal City courtroom was filled. A double line of waiting spectators wound down the corridor and spilled over into a crowd on the steps of the courthouse. Uniformed policemen maintained order on the steps and just outside the great carved wooden doors to the courtroom. Inside the doors, the bailiff stood at his desk just below the high bench, alertly watching the crowd.

As a side door opened and defendant John Little was led in under guard, a cold current ran through the people. All conversation ceased abruptly. Every face turned to watch Little enter and cross to his seat within the rail. The faces were hostile. Someone hissed, and the bailiff shook his head warningly at the audience.

A cloud of hatred, dank and stifling, seemed to hang oppressively above the people. It was felt by Little and it also enveloped the lone slight figure of his attorney at defense counsel's table.

The Federal City prosecutor and two assistants pushed through the crowd, spread the contents of bulging briefcases on the counsel table, and sat down. The heavy atmosphere in the courtroom was pierced only by the rays of the morning sun, which cast a dusty slanting column of weak light across the counsel tables and etched young Kennedy's shadow on the wall.

Faintly, a buzzer sounded at the bailiff's desk, and almost at once the oak door to the judge's chamber opened. As the judge entered and mounted the steps to his bench, the bailiff intoned: "Remain

seated and come to order. The District Court in and for Federal City, the Honorable Judge Waller presiding, is now in session."

The judge glanced briefly at the packed courtroom and at counsels' tables. His face was impartial and grave, as he said, "People versus John Little." The prosecuting attorney rose, and answered, "Ready for the People."

Richard Kennedy, attorney at law, rose from his seat at defense counsel's table. From his position slightly to the side of the courtroom, he could see the crowd watching him. As he stood, he sensed the scorn and hatred for his client and himself. As he had expected, the people already identified him with the man he represented and with the crime of which that man was accused. Kennedy felt a surge of panic. He was very much alone. Then he glanced at the rear of the courtroom. In that quick glance, his eyes touched for a moment on the last bench in the back of the room. There, watching him, sat the figures he had met there the other night. They nodded quietly to him. All at once, Kennedy no longer was alone. His shadow on the courtroom wall grew taller, somehow.

Softly, Kennedy said to himself, "My co-counsel are with me." Then he turned to face the judge, and in a firm voice announced: "Ready for the defendant, your Honor."

#### FOOTNOTE AND SOURCE MATERIAL

The format in which the above material was presented did not permit the interpolation of footnotes by number reference. Therefore, footnote and source material is appended hereto in the order in which it was referred to or relied upon in the text.

<sup>1</sup>Plato, *Dialogues: the Apology and Phaedo*, Jowett translation.

<sup>2</sup>Bierstadt, *Curious Trials and Criminal Cases* (N. Y. 1928).

<sup>3</sup>Holy Bible, Matthew 27:22-24; Acts 26.

<sup>4</sup>Bloom, *The Story of the Constitution* (Washington, D. C. 1937), 29, 45-46.

<sup>5</sup>U. S. Const. Amend. VI; U. S. Const. Amendments I-X.

<sup>6</sup>Section 6068, *California Business and Professions Code*.

<sup>7</sup>Canon 4, *Canons of Professional Ethics* (1950), American Bar Association.

<sup>8</sup>Canon 5, *Canons of Professional Ethics* (1950), American Bar Association.

<sup>9</sup>Beck, *May It Please The Court* (N. Y. 1930), 102 (Re Malesherbes).

<sup>10</sup>Paine, *Rights of Man* (1792).

<sup>11</sup>Parry, *The Seven Lamps of Advocacy* (London 1923), 30-32 (Re Erskine).

<sup>12</sup>Beck, *May It Please The Court* (N. Y. 1930) 103-104 (Re Erskine, Adams and Quincy).

<sup>13</sup>Parry, *The Seven Lamps of Advocacy* (London 1923), 32-34 (Re Seward).

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<sup>15</sup>Allen, *Bryan and Darrow at Dayton* (N. Y. 1925); Bierstadt, *Curious Trials and Criminal Cases* (N. Y. 1928) (Re Darrow).

<sup>16</sup>Butler, *Lawyer and Client; Their Relation, Rights and Duties* (N. Y. 1871).

<sup>17</sup>Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul 1953).

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